Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1620

FIRST NATIONAL BANK AND TRUST COMPANY IN ALTON,
Executor of the Estate of Joseph E. Knight,
Petitioner,

vs.

SAMUEL BERKE, Receiver of City Savings Association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional Provisions Involved	3
Statement of the case	3
Reasons for granting writ of certiorari	9
Conclusion	21

Citations

Cases:

Barr v. Matteo, 360 U.S. 564	11
Bush v. Babb, 23 Ill. App. 2d 285, 162 N.E. 2d 594	12, 14, 16
DeCorrevant v. Lohman, 84 Ill. App. 2d 221, 228 N. E. 2d 592	15
Doe v. McMillan, 412 U.S. 306	11
Economou v. U.S. Department of Agriculture, 535 F. 2d 688, cert. granted Butz v. Economou, No. 76-709, — U.S. —, 97 S. Ct. 1097	11
Expeditions Unlimited, etc. v. Smithsonian Inst., 566 F.2d 289	11
Kelly v. Ogilvie, 35 Ill. 2d 287, 220 N.E. 2d 172, aff'd 64 Ill. App. 2d 144, 212 N.E.2d 279	12, 16

List v. O'Connor, 21 Ill. App. 2d 399, 158 N.E. 2d 103 12
Lusietto v. King, 107 Ill. App. 2d 239, 246 N.E. 2d 24 13

McCormick v. Burt, 95 Ill. 263 12
Miils v. American Surety Co. of New York, 26 Idaho 652, 145 P. 1097 16

O'Connor v. Donaldson, 422 U.S. 563 11

Peabody v. Sanitary District of Chicago, 330 Ill. 250, 161 N.E. 519 14
People ex rel. Munson v. Bartels, 138 Ill. 322, 27 N.E. 1091 13
People of State of Illinois v. Maryland Casualty Co., 132 F. 2d 850 .....12, 16
Pierson v. Ray, 386 U.S. 547 11
Procunier v. Navarette, — U.S. —, 98 S. Ct. 855, 55 L. Ed. 2d 24 .....9, 10

Reiter v. Illinois National Casualty Co., 397 Ill. 141, 73 N.E. 2d 412, c.d. sub nom. Reiter v. Palmer, 332 U.S. 791 15

Scheuer v. Rhodes, 416 U.S. 232 10
Stump v. Sparkman, — U.S. — (No. 76-1750) 12

Tcherepnin v. Franz, 277 F. Supp. 472, reversed 371 F. 2d 374, reversed 389 U.S. 332 3
Tcherepnin v. Franz, 393 F. Supp. 1197 2
Tcherepnin v. Franz, 424 F. Supp. 778 2
Tcherepnin v. Franz, 570 F. 2d 187 1

Wood v. Strickland, 420 U.S. 308 11

Constitutional Provisions, Statutes, and Rules:

Amendment XIV, Section 1, United States Constitution 2, 3, 21
15 U.S.C. 78a et seq. 4
28 U.S.C. § 1292(b) 3
28 U.S.C. § 1893 11
42 U.S.C. § 1983 9
Rule 9(b) Federal Rules of Civil Procedure 3, 10, 17
Rule 54(b) Federal Rules of Civil Procedure 7
Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963. ch. 32, Section 702.1-2, p. 1263 .....3, 15
Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963. ch. 32, Article 10, Sections 921-922, pp. 1287-1288 .....3, 6, 8, 19, 20
Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963. ch. 32, Article 9, Sections 901-902, pp. 1285-1287 .....3, 6, 8, 18, 19, 20
Illinois Financial Code, Vol. 3, Ill. Rev. Stat. 1963, ch. 127 .....3, 12, 13
Illinois Financial Code, Vol. 3, Ill. Rev. Stat. 1963, §§ 63 (b) 25, 27, 35 .....3, 12, 13

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To the United States Court of Appeals
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First National Bank and Trust Company in Alton, Executor of the Estate of Joseph E. Knight, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case entered on January 23, 1978, which affirmed the judgment of the District Court in favor of Respondent against Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. A-1-13) is reported at 570 F. 2d 187. The memorandum and order of the District Court as to liability (App. B, pp. A-14-56) is re-

ported at 393 F. Supp. 1197, and the District Court's memorandum and order which approved the Special Master's report as to damages (App. C, pp. A-57-64) is reported at 424 F. Supp. 778. The memorandum and order of the District Court which denied Petitioner's motion for new trial is not reported (App. E, A-67-69).

JURISDICTION

The judgment of the Court of Appeals (App. F, pp. A-70-71) was entered on January 23, 1978. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on February 24, 1978 (App. G, pp. 72-73). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) Whether, under the Fourteenth Amendment to the Constitution of the United States, the late Director of the Department of Financial Institutions of the State of Illinois had either an absolute or a qualified immunity from suit for damages based upon his performance of official duties in connection with his statutory supervisory responsibility.

2) Whether the doctrine of official immunity may be circumvented by a finding upon summary judgment that the public officer "intentionally" violated official duties, and thus "maliciously" did so, whereas in fact neither an intentional nor a malicious violation had been alleged.

3) Whether the doctrine of official immunity may be further circumvented by finding upon summary judgment that the public officer violated a ministerial duty imposed by a certain statute, when in fact the particular statute on its face had no application to the admitted facts, which were covered by a separate and distinct statutory provision, which was in no way violated or alleged to have been violated.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1 provides in part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963, Ch. 32, pp. 1262-1288; Article 1, Sections 701, 702, 1-2, 710(d); Article 7, Section 848, 849, 850, 854, 855; Article 9, Sections 901-909; Article 10, Sections 921-927). (Text in Appendix H)

Rule 9 (b) of the Federal Rules of Civil Procedure (Appendix K)

Illinois Financial Code, Vol. 3, Ill. Rev. Stat. 1963, Ch. 127, pp. 393-394, Sections 63 b 25, 63 b 27, 63 b 35. (Appendix L)

STATEMENT OF THE CASE

The original action from which this cause arose was filed in 1964, wherein the plaintiffs sought to have their withdrawable capital shares in the City Savings Association held to be securities within the meaning of the Securities Exchange Act, and to have themselves declared creditors of the Association. In 1966 the District Court for the Northern District of Illinois assumed jurisdiction, and thereafter certified its ruling so as to make it appealable under Title 28 U.S.C. Section 1292 (b), reported in *Tcherepnin v. Franz*, 277 F. Supp. 472. This action was reversed by the Circuit Court of Appeals for the Seventh Circuit in *Tcherepnin v. Franz*, 371 F. 2d 374, which decision was in turn reversed in *Tcherepnin v. Knight*, 389 U.S. 332.

Inasmuch as the original action was brought under the Securities Exchange Act of 1934 (Title 15 U.S.C. Section 78 a et seq.), federal jurisdiction existed, which was retained in the cross-complaint which the Receivers subsequently filed.

In 1968 receivers were appointed for the Association. In 1969 the Receivers filed their first cross-complaint and amended first cross-complaint, consecutively. The latter contained four counts. Count I was directed against Joseph E. Knight and three other individuals, and charged Knight as a former Director of Financial Institutions of the State of Illinois, with having violated his official duties in the supervision and examination of City Savings, as a result of which its assets were depleted.

Count II was directed against Knight and one other individual, and was predicated upon their having taken custody of the Association's assets, and their having subsequently relinquished them pursuant to a two-thirds vote of the shareholders of the Association to voluntary liquidators before the conditions for taking the assets were corrected. Count III was dismissed by the Receiver, and Count I was not directed against Knight. (Counts I and II are preserved in App. I, pp. A-87-92).

On May 30, 1973, the Executor of the Knight Estate was substituted for Mr. Knight. Thereupon the Executor moved to dismiss the amended first cross-complaint on the following grounds, cardinal to this petition:

(a) that as a high state official whose office required the exercise of discretion and judgment, Knight was immune from charges of personal liability in the discharge of such responsibility.

(b) that the examinations of the Association's books which were complained of were not conducted by Knight, but by his subordinates, for whose acts or defaults he was personally not liable; and

(c) that the statutory duties which Knight allegedly violated were duties owed to the State and not to private individuals.

On November 5, 1973, the Receiver filed a motion for summary judgment against the Executor. On April 14, 1975, the District Court filed its memorandum and order (App. B, pp. A-14-56), which denied the Executor's motion to dismiss and granted the Receiver's motion for summary judgment on Counts I and II against the estate.

In denying the Executor's motion to dismiss Count I, the Court acknowledged the established doctrine of the qualified immunity of Illinois public officials whose acts are discretionary. However, the Court denied the doctrine of official immunity to Knight by implying that the duties of the Director of the Department of Financial Institutions were ministerial, as distinguished from discretionary, and by holding that the violation of official duties as alleged against Knight were necessarily intentional and malicious (App. B, pp. A-28-31), although there were no allegations of malice, intent or corruption made against Knight in the cross-complaint (App. I, pp. A-87-92). Similarly, in granting the Receiver's motion for a summary judgment on Count I, the Court found that the evidence showed as a matter of law that Knight "wilfully and maliciously disregarded his duty to supervise City Savings" (App. B, p. A-33). In fact, no such charge or conduct had been alleged (App. I, pp. A-87-89).

In granting the Receiver's motion for summary judgment on Count II, the Court again denied to Knight the doctrine of official immunity by adopting a "fraud theory" and finding that the evidence showed that Knight had entered into a secret scheme with one C. Oran Mensik, the president, board chairman, and chairman of the executive committee of City Savings, and an attorney named Theodore J. Isaacs, the purpose of which was to defraud the depositors by foisting a corruptly adopted plan for voluntary liquidation upon the Association (App. B,

pp. A-40-48). In fact, Count II contained no allegations of fraud, corruption, or malice, nor was there any mention of Mensik or Isaacs either by name or otherwise, nor was there any attack made on the plan of liquidation or the method by which it was adopted (App. I, pp. A-89-92).

Moreover, in granting a summary judgment on Count II, the Court also adopted a "statutory violation theory," and held that by taking custody of the Association's assets for the causes specified in Section 848 of the Illinois Savings and Loan Act (App. H. pp. A-75-76), and then delivering them to voluntary liquidators, pursuant to a two-thirds vote of the shareholders of the Association, before the causes for taking custody were corrected, Knight violated Sections 921 and 922 of the Illinois Savings and Loan Act (App. H, pp. A-83-84). Here again the Court denied the protection of the doctrine of official immunity to Knight. Sections 921 and 922 of the Act are part of Article 10 of the Act, which applies only to cases of involuntary liquidation (App. H, pp. A-83-86). The Court acknowledged that the liquidation in this case was a voluntary one, but did not acknowledge that voluntary liquidations are regulated by Article 9 of the Act, which permits such liquidations at any time and which does not prohibit the relinquishment of assets by the state officials to the liquidators, regardless of whether the causes for taking custody have been cured (App. H. pp. A-78-83).

On April 24, 1975 the Executor filed its answer, in which it pleaded official immunity and nonliability for subordinates' acts as to Count I, and pleaded official immunity and lack of duty to the plaintiffs and the Receiver as to Count II (App. J, pp. A-93-95).

On May 8, 1975, the Court ordered that proceedings to determine the amount of damages to be recovered from the Estate be referred to a special master for hearing and report. The Special Master recommended that damages be assessed

against the Estate in the amount of $14,274,304 and that judgment be entered therefor.

The Executor's objections to the report of the Special Master were overruled by the Court on November 30, 1976 (App. C, pp. A-57-64). At that time the court ordered that judgment be entered against the Estate in the amount of $13,969,504. On December 20, 1976, the Receiver filed a motion under Rule 54(b) of the Federal Rules of Civil Procedure, for entry of a final judgment, which the court entered as of that date for $13,969,500. (App. D, pp. A-65-66).

On December 27, 1976, the Executor filed its motion for new trial, disputing the propriety of summary judgment and requesting trial. The motion was denied on March 1, 1977 (App. E, pp. A-67-69).

On March 29, 1977, the Executor filed its notice of appeal and its cost bond, to the Circuit Court of Appeals. On January 23, 1978, that Court affirmed the District Court (App. A, pp. A-1-13; App. F, pp. A-70-71).

In its decision the Court of Appeals upheld the summary judgment on Count I, and ruled that ". . . the allegations necessarily entail malicious conduct, that is, the wanton and deliberate commission of a wrongful act." The court then explained this statement as follows:

". . . Such is the case here, for to allege, as the plaintiffs did, that Knight *intentionally* ignored or concealed examinations indicating that City Savings was not conducting its business in accordance with the Illinois Savings and Loan Act is necessarily to claim that Knight wilfully and wantonly—in short 'maliciously'—breached his official duty to supervise the affairs of that institution. . . ." (App. A, p. A-7) (emphasis added).

However, contrary to the Court's express finding that the word "intentionally" had been alleged, neither that word nor any synonym therefor was in fact averred (App. I, pp. A-87-89).

Moreover, in affirming the judgment of liability on Count II, the Court of Appeals followed the District Court in applying Sections 921-922 of the Illinois Savings and Loan Act to a voluntary liquidation, even though those sections are part of Article 10 of that Act and pertain only to *involuntary* liquidations and not to *voluntary* liquidations, which are regulated by Article 9 of the Act, Vol. 1, Ill. Rev. Stat. 1963, Ch. 32, §§ 901-909, pp. 1285-1286 (App. H, pp. A-78-83).

REASONS FOR GRANTING WRIT OF CERTIORARI

Part I

Denial of Official Immunity

This Petition should be granted because the decision of the United States Circuit Court of Appeals for the Seventh Circuit conflicts with and departs from the applicable decisions of this Court and of other Circuit Courts of Appeals concerning immunity of high state officials.

On February 22, 1978—two days before the Court of Appeals for the Seventh Circuit denied the Estate's petition for rehearing—this Court published its decision in *Procunier v. Navarette*, — U.S. —, No. 76-446, 98 S. Ct. 855, 55 L. Ed. 2d 24.

In that case the director of the California Department of Corrections, and the warden and assistant warden at Soledad Prison, had been sued for violation of an inmate's civil rights by allegedly having condoned the refusal by their subordinates to mail various items of correspondence prepared by the inmate, and for having conspired with the subordinates to this end. The District Court had granted summary judgment for the defendants, and the Court of Appeals for the Ninth Circuit reversed. This Court granted certiorari.

In reversing that Court of Appeals, this Court ruled that in cases brought under Title 42 U.S.C. Section 1983, state officials, such as the petitioners before it, were entitled to a qualified immunity for their official acts, but that at the time of the alleged violations of the inmate's constitutional rights there was no established First Amendment right as to mailing privileges, so that petitioners had no reason to know that any rights were violated. Moreover, the decision held that *negligent* con-

duct on the part of petitioners did not constitute "intentional and bad faith conduct," or conduct characterized by "malicious intention."

The strongest allegation that was made against Knight in Count I of the cross-co..plaint is in paragraph 5 thereof (App. I, p. A-88-89):

". . . Thus, during the period from 1959-1964, there were either no meaningful examinations whatsoever by the Director or, in the alternative, examinations were in fact made but the truth about the institution's dire condition was ignored or concealed . . ."

This allegation is subject to being construed as one of negligence or of nonfeasance. However, it does not in the most remote fashion allege any "intentional," "malicious" or "wanton" wrongdoing.

Moreover, even if it could be construed as alleging any of such conditions of the mind, it would be a manifest violation of Rule 9 (b) of the Federal Rules of Civil Procedure, which requires that such conditions of mind be averred (App. K, p. A-96). The statement in the opinion of the Court of Appeals ". . . to allege, as the plaintiffs did, that Knight *intentionally* ignored or concealed examinations . . ." (App. A, p. A-7) (emphasis added), is not supported by any statement in the record and is without foundation; no such charge was in fact alleged (App. I, pp. A-87-89).

Accordingly, there being no element of malicious or intentional wrongdoing presented in the charges against Knight, he was protected by at least a qualified immunity in this suit against him.

This immunity is further exemplified in the following cases cited in *Procunier v. Navarette* and applying to state officials: *Scheuer v. Rhodes*, 416 U.S. 232 (1974), regarding a governor,

a president of a state university, and members of a state national guard; *Wood v. Strickland*, 420 U.S. 308 (1975), local school board members; *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the superintendent of a state hospital; and *Pierson v. Ray*, 386 U.S. 547 (1967), policemen.

All of these cases were brought under Title 28 U.S.C. Section 1893 for violation of civil rights. Inasmuch as there are neither violations of civil rights nor malice alleged in the cross-complaint (App. I, pp. A-87-92), there is no reason to deny an absolute immunity to Knight, as was approved by this Court in *Barr v. Matteo*, 360 U.S. 564 (1959), as to a member of the executive branch of the Federal Government, and in *Doe v. McMilian*, 412 U.S. 306 (1973), as to District of Columbia public school officials and employees, members of the House of Representatives Committee for the District, and federal legislative employees.

Moreover, in the case of *Economou v. U.S. Department of Agriculture*, 535 F. 2d 688 (1976), the United States Court of Appeals for the Second Circuit recognized a qualified immunity as to the Secretary of Agriculture and other officials of that Department, and this Court has granted certiorari to the former Secretary and the other officials in the case now pending under the style *Earl J. Butz, et al. v. Arthur N. Economou, et al.*, No. 76-709, — U.S. —, 97 S.Ct. 1097, wherein the petitioners are seeking a decision that their immunity is absolute.

The decision of the Court of Appeals for the Seventh Circuit is contrary to that of the Court of Appeals for the Second Circuit for the reason that it denied to Knight even a qualified immunity. It is also contrary to the decisions of the Court of Appeals for the District of Columbia in *Expeditions Unlimited, etc. v. Smithsonian Inst.*, 566 F. 2d 289 (1977), wherein absolute immunity was found to protect an official of the Smithsonian Institute.

Inasmuch as Knight was an official of the State of Illinois, the substantive law of that State should apply. In *People of State of Illinois v. Maryland Co.*, 132 F. 2d 850 (1942), immunity, in the absence of malice, was applied to the Director and officers of the State Department of Welfare, although the plaintiffs included legal representatives of four men who had died as a result of drinking contaminated water while working on construction of a state hospital. Similarly, such absolute immunity was found in: *McCormick v. Burt*, 95 Ill. 263 (1880), as applied to a teacher and the directors of a public school; *Kelly v. Ogilvie*, 35 Ill. 2d 287, 220 N.E. 2d 172 (1966) aff'g 64 Ill. App. 2d 144, 212 N.E. 2d 279, a sheriff and jail warden; *Bush v. Babb*, 23 Ill. App. 2d 285, 162 N.E. 2d 594 (1959), another sheriff and jail warden; and *List v. O'Connor*, 21 Ill. App. 2d 399, 158 N.E. 2d 103 (1959), a park district's agent sued for wrongful death.

Moreover, inasmuch as Knight's duties and actions in supervising supervisors and in taking custody of the assets of City Savings and subsequently relinquishing them to voluntary liquidators were quasi-judicial, and because his decisions were strictly within the scope of his official authority, the reasoning of the Court in the recent case of *Stump v. Sparkman*, — U.S. — (No. 76-1750), should be applicable to the end that Knight's immunity from personal liability was absolute.

Discretionary v. Ministerial Duties

The duties of the Director of the Department of Financial Institutions are stated in Vol. 3, Ill. Rev. Stat. 1963, Ch. 127, pp. 393-394, Sections 63 (b) 25, 27 (App. L, pp. A-97-100 hereof). They include the responsibilities of directing and supervising all department administration and technical activities, carrying out the laws and regulations, appointing experts and assistants, fostering and developing programs, attending meetings of advisory boards, making continuous studies, and making reports to the Governor.

Moreover, the statute further provides (Vol. 3, Ill. Rev. Stat. 1963, Ch. 127, p. 394, Section 63 b 35; App. L, p. A-100) that under the Director are a Supervisor of Banks, a Supervisor of Savings and Loan Associations, a Supervisor of Consumer Finance Businesses, a Supervisor of Currency Exchanges, and a Supervisor of Credit Unions. All of them are appointed by and responsible to the Director, and they are administratively responsible for the financial institutions to which their appointments relate.

In its decision the Court of Appeals indicated that Knight's duties were of a ministerial nature, as distinguished from discretionary, as to Count I (App. A, p. 5). In support of its statement, the court cited *People ex rel. Munson v. Bartels*, 138 Ill. 322, 27 N.E. 1091 (1891). However, that case determined the liability of a probate court clerk who had certified a false acknowledgment on a mortgage and was held to be personally responsible therefor. The facts upon which that decision was made do not compare with the statutory duties of supervision which were imposed on Knight.

Far more appropriate is *Lusietto v. King*, 107 Ill. App. 2d 239, 246 N.E. 2d 24 (1969), where the plaintiff's deceased was killed when his automobile hit a hole on a state highway. The defendant was maintenance supervisor for state highways in that district, and in reversing the judgment against him the court said (p. 27):

"Additionally, the defendant's duties were not ministerial, they were governmental in character and required the use of discretion and judgment. With regards to holes in the highway, the defendant must exercise discretion and judgment as to which holes to fill and which holes not to fill. Of the holes to fill, which holes are to be filled first . . ."

Similar in point is *Bush v. Babb*, 23 Ill. App. 2d 285, 162 N.E. 2d 594, 597 (1959), which was a suit against the sheriff and the jail warden by a man who had contracted tuberculosis while a jail inmate. A motion to dismiss was sustained by the trial court, which action was affirmed on appeal. The court noted that the statute provides that the warden shall furnish necessary bedding, clothing, fuel and medical aid for all his prisoners, and keep an accurate account of it, but held that these duties were *not ministerial*, and were "quasi-judicial . . . and carry with them the immunity from liability for mere negligent omission to provide proper and adequate medical care . . ."

The distinction between official acts which are ministerial and non-ministerial is set forth in *Peabody v. Sanitary District of Chicago*, 330 Ill. 250, 161 N.E. 519 (1928). This cause originated as a taxpayer's bill for an accounting in which the chancellor entered a decree dismissing the suit for want of equity. The Appellate Court reversed, and remanded with directions to order an accounting. The Supreme Court affirmed the Appellate Court. In doing so, the court said of the Treasurer of the Sanitary District, who also had an interest in the contractors and in the bank that financed them (p. 522): ". . . Official action is judicial where it is the result of judgment or discretion. It is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, manner, and occasion of its performance with such certainty that nothing remains for judgment or discretion . . ." Thus, Knight's duties of supervision were manifestly discretionary, and not ministerial.

Non-Liability for Acts or Omissions of Subordinates

A subsidiary question to that of official immunity is whether Knight might properly be held liable for acts or defaults of his subordinates. As has been previously demonstrated, the duties

of the Director of the Department of Financial Institutions were supervisory. Count I of the Receiver's First Amended Cross-Complaint in paragraph 5 (App. I, p. A-89) charges in part: ". . . Nor was there any proper supervision by Cross-Defendants Stulfa, Swope, and Hulman of the affairs of the City Savings from 1959-1964 . . ." (These individuals were successively Supervisors of the Department of Savings and Loan Associations under Knight.)

Specifically, Knight and his Estate are charged in Count I with liability for the alleged nonfeasance of his subordinates. Under established Illinois law there is no such liability. This was decided conclusively in the case of the Director of Insurance in *Reiter v. Illinois National Casualty Co.*, 397 Ill. 141, 73 N.E. 2d 412, c.d. sub. nom., *Reiter v. Palmer*, 332 U.S. 791 (1947), and in the case of the Sheriff of Cook County in *DeCorrevant v. Lohman*, 84 Ill. App. 2d 221, 228 N.E. 2d 592 (1967).

Therefore, the Court of Appeals for the Seventh Circuit has decided an important state question in a way in conflict with applicable law of the State of Illinois.

Non-liability for Breach of Duties Owed the State of Illinois, and Not to Individuals

Another question related to that of official immunity is whether Knight's duties (assuming that he had no immunity) were owed to the State, as distinguished from the Association's depositors.

The policy of the Illinois Savings and Loan Act is set forth in Vol. I, Ill. Rev. Stat. 1963, Ch. 32, Section 702.1-2 p. 1263 (App. H, p. A-74), where it is stated in substance that the business is affected with a public interest and should "be supervised as a business affecting the economic security and

general welfare of the people in this State; . . ." The statement of policy contains no clause insuring depositors that, should an association fail, they will be reimbursed at the expense of state officials.

The Court of Appeals, in finding that the depositors in effect were provided such insurance (App. A, p. A-6), cites the case of *Mills v. American Surety Co. of New York*, 26 Idaho 652, 145 P. 1097 (1914), presumably because in that case individual depositors were entitled to sue on the official bond of the state banking commissioner. However, their rights in this respect grew out of the statutory requirement that (p. 1098): ". . . any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof." Absent such a provision, there is no reason to believe the individuals would have had standing to sue.

That Illinois law has adopted a principle of non-liability to third parties is shown by *People of the State of Illinois v. Maryland Casualty Co.*, 132 F. 2d 850, 852 (7th Cir. 1942), which involved four wrongful death cases and multiple personal injury actions. There the Circuit Court of Appeals affirmed dismissal on the ground that the duty to furnish uncontaminated water to construction workers on state projects was a public duty and not one owed to any particular person and that for their ". . . negligence or wanton or wilful omission in the performance of this public duty, the officers are not liable, except to the State. . . ." *In Kelly v. Ogilvie*, 35 Ill. 2d 287, 220 N.E. 2d 172 (1966), aff'g 64 Ill. App. 2d 144, 212 N.E. 2d 279, the same doctrine was upheld in defense of the sheriff, the jail warden, a jail officer, and the surety on the sheriff's bond in a suit by a jail inmate who had been attacked by another inmate, who had been permitted to enter the plaintiff's cell. Similarly in *Bush v. Babb*, 23 Ill. App. 2d 285, 162 N.E. 2d 594, 597 (1959), where the sheriff and jail warden were sued by a man who had become tubercular while an inmate, charging that defendant's negligence in caring for his health had

caused his illness, the dismissal of suit was affirmed because the officers' duties were owed to the state ". . . and not to the individuals who are the inmates. . . ."

Again, in this respect, the Court of Appeals for the Seventh Circuit has decided an important state question in a way in conflict with applicable law of the State of Illinois.

Summation as to Part I

The decision of the Court of Appeals in this case is in conflict with the decisions of this Court and with the decisions of the Court of Appeals for the Second Circuit and for the District of Columbia, respectively. Further, because the Court of Appeals in its decision found that Knight had "intentionally disregarded his official duties" had been alleged, whereas in fact it had *not* been alleged, the record in this case has been misquoted; and because the Receivers' First Amended Cross-Complaint *failed to allege "malice," "intention," or "wanton,"* Rule 9 (b) of the Federal Rules of Civil Procedure was manifestly violated, and the exercise of power of supervision of this Court is called for. For the stated reasons, certiorari should be granted. The end results of these conflicts has been the denial to Knight—and to his Executor—of the immunity from personal liability that is accorded high state officials, which is a violation of his rights to due process guaranteed by the Fourteenth Amendment.

Part II

Denial of Official Immunity.

The District Court and the Court of Appeals again denied to Knight the doctrine of immunity of high state officials by holding his estate liable under the averments of Count II of the Receivers' First Amended Cross-Complaint. Count II al-

leges that on June 26, 1964, Knight and his Supervisor of Savings and Loan Associations took custody of the assets of City Savings upon a determination that it was their statutory duty to do so. The pleading then charged that Knight, in less than three months, delivered custody of the assets to voluntary liquidators while the causes for taking custody had not been corrected. At no place in the cross-complaint was the voluntary liquidation attacked as fraudulent, improperly adopted, or in any way inspired by Mr. C. Oran Mensik, or by any other person. Indeed, the plan of voluntary liquidation had been prepared by the Attorney General of Illinois, as pleaded in the Executor's answer (App. J, p. A-94), and as found by the District Court (App. B, pp. A-50-51).

Nevertheless the District Court and the Court of Appeals held Knight liable for his decision as Director of the Department of Financial Institutions, to approve the plan of voluntary liquidation and to deliver the assets to the liquidators (App. B, p. A-52; App. pp. A-10-13). In doing so, both courts refused to uphold the doctrine of official immunity and thereby denied due process to Knight and his Executor.

Under Article 9, Sections 901-902 of the Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963, Ch. 32, pp. 1285-1286 (App. H, pp. A-78-83), an association may liquidate voluntarily upon approval of two-thirds or more of the total number of votes which all members of the association are entitled to cast. This may be done at any time, regardless of whether the Director of Financial Institutions had taken custody of the association's assets, and regardless of whether the causes for having done so have been corrected.

The court circumvented the doctrine of official immunity as applied to Count II by holding that Knight's failure to appoint a receiver for the Association and his failure to direct the Attorney General of Illinois to initiate court action for liquidation

and dissolution, and for an injunction restraining the management for continuing operations, was a breach of a *ministerial* duty, (App. B, pp. A-52-53). In taknig this position, the court expressly relied upon and quoted Sections 921 and 922 of the Illinois Savings and Loan Act, Vol. 1, Ill. Rev. Stat. 1963, Ch. 32 § 921-922, p. 1287 (App. H, pp. A-83-84).

These sections are a part of Article 10 of the Act, which on its face applies exclusively to *involuntary* liquidations. However, both the District Court and the Circuit Court of Appeals found this liquidation to have been a *voluntary* one (App. A, pp. A-10-11; App. B, pp. A-50-52). As previously stated, the part of the Illinois Savings and Loan Act which applies to voluntary liquidations is Article 9 thereof (App. H, pp. A-78-83). In Section 904 of that Article it is stated in part:

"(b) If the Director finds that the plan and proceedings are in accordance with this Act, that the bonds of the liquidators are sufficient, and that the plan is not unfair to any person affected, he shall attach his certificate of approval to the plan as I shall forward one copy to the liquidators, and in the case of an insured association, one copy to the insurance corporation."

The statute then provides that the plan becomes effective upon the recording of the Director's certificate of approval.

This decision by the Director is necessarily a discretionary one, manifestly excluding any aspect of being ministerial. Moreover, the plan of liquidation was prepared and approved by the Attorney General of Illinois, as above stated, and no corruption, negligence, or ineptitude was alleged as to him or as to any other person at any time. (App. I, pp. A-89-92).

Therefore, the refusal of the District Court to follow the doctrine of official immunity—which had been pleaded with

particularity—and the approval by the Court of Appeals of this refusal was founded upon a misapplication of statutory provisions, resulting in the denial of due process to Knight, contrary to the provision of the Fourteenth Amendment to the Constitution.

Summation as to Part II

Because of the manifest misapplication of Article 10 of the Illinois Savings and Loan Act (which pertained only to *involuntary* liquidations), to what was acknowledged to be a *voluntary* liquidation of a savings and loan association (regulated by Article 9 of the Act), the exercise of the power of supervision of this Court is called for. Moreover, in misapplying the statute, the Court of Appeals and the District Court erroneously charged Knight with having violated a ministerial duty and thereby denied him and his Executor any of the immunity to which he was entitled by due process. Therefore, certiorari should be granted.

CONCLUSION

Inasmuch as the denial of the doctrine of official immunity—whether it be absolute or qualified—to Knight and his Estate, as set forth under Part I hereof, and the further denial of immunity which was affected by the statutory misapplication set forth in Part II hereof, would deny due process to Knight and to his Estate, contrary to the Fourteenth Amendment to the Constitution, and because of the impact of the decision of the Court of Appeals upon the hundreds of thousands of government officials and employees at federal, state, and local levels, whose duties are discretionary, the writ of certiorari should be granted.

Respectfully submitted,

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